IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

JUDGE RICHARD A. BANSTRA, PRESIDING

MICHAEL LIND,

Plaintiff-Appellant,

V

Supreme Court Number: 122054
Court of Appeals: 227874
Calhoun County Circuit Ct: 98-005111-CL

CITY OF BATTLE CREEK,

Defendant-Appellee.

/

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BRIEF ON APPEAL--APPELLEE

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

FEDERAL CASE LAW

MICHIGAN CASE LAW

CONSTITUTIONAL LAW

OTHER FEDERAL SOURCES

OTHER MICHIGAN SOURCES

JURISDICTIONAL SUMMARY

The jurisdictional summary of the Plaintiff-Appellant is complete and correct.

STANDARD OF REVIEW

Plaintiff-Appellant correctly states that the standard of review by an appellate court of a decision to grant a motion for summary disposition is de novo. *Veenstra v. Washtenaw Country Club*, 466 Mich 155, 645 NW2d 643 (2002).

However, this case also involves questions of statutory construction and constitutional issues. These questions are also reviewed de novo. *Tolksdorf v. Griffith*, 464 Mich 1, 626 NW2d 163 (2001).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID PLAINTIFF-APPELLANT DEMONSTRATE DIRECT EVIDENCE OF DISCRIMINATION SO AS TO AVOID THE *MCDONNELL DOUGLAS* SHIFTING BURDEN ANALYSIS?

The Trial Court and Court of Appeals said, "No."

Plaintiff-Appellant says, "Yes."

Defendant-Appellee says, "No."

II. DID THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY APPLY THE "BACKGROUND CIRCUMSTANCES" TEST IN THIS MATTER?

The Trial Court and the Court of Appeals said, "Yes."

Plaintiff-Appellant says, "No."

Defendant-Appellee says, "Yes."

III. IS THE "BACKGROUND CIRCUMSTANCES" STANDARD ADOPTED IN *ALLEN V. COMPREHENSIVE HEALTH SERVICES*, 222 MICH APP 426; 564 NW2D 914 (1997), CONSISTENT WITH THE MICHIGAN ELLIOTT-LARSEN CIVIL RIGHTS ACT, MCL 37.2101 *ET SEQ.?*

The Trial Court and Court of Appeals did not address this question.

Plaintiff-Appellant says, "No."

Defendant-Appellee says, "Yes."

IV. IS THE "BACKGROUND CIRCUMSTANCES" STANDARD CONSISTENT WITH THE EQUAL PROTECTION CLAUSES OF THE FOURTEEN AMENDMENT TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 2 OF THE MICHIGAN CONSTITUTION OF 1963?

The Trial Court and the Court of Appeals did not address this question.

Plaintiff-Appellant says, "No."

Defendant-Appellee says, "Yes."

V. ALTHOUGH THE "BACKGROUND CIRCUMSTANCES" STANDARD IS CONSISTENT WITH THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND MICHIGAN CONSTITUTIONS, SHOULD IT CONTINUE TO BE USED WHEN EVALUATING MOTIONS FOR SUMMARY DISPOSITION IN SO-CALLED "REVERSE DISCRIMINATION" CASES ALLEGING A VIOLATION OF THE MICHIGAN ELLIOTT-LARSEN CIVIL RIGHTS ACT?

The Trial Court and Court of Appeals did not address this issue.

Plaintiff-Appellant did not address this issue.

Defendant-Appellee says, "No."

VI. APPLYING A "NEUTRAL FACTOR" TEST TO THE FACTS OF THIS CASE, IS DEFENDANT-APPELLEE STILL ENTITLED TO SUMMARY DISPOSITION?

The Trial Court and Court of Appeals did not address this issue.

Plaintiff-Appellant did not address this issue.

Defendant-Appellee says, "Yes."

VII. DID PLAINTIFF-APPELLANT DEMONSTRATE THAT THE NON-DISCRIMINATORY REASON PROFFERED BY THE DEFENDANT-APPELLEE FOR THE PROMOTION DECISION IN THIS CASE WAS PRETEXT?

The Trial Court and Court of Appeals says, "No."

Plaintiff-Appellant says, "Yes."

Defendant-Appellee says, "No."

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Material Proceedings

Prior to filing the present action now on appeal, the Plaintiff-Appellant filed a discrimination complaint with the Michigan Department of Civil Rights regarding the promotion of a minority candidate to the position of sergeant within the City of Battle Creek Police Department in May of 1996. (Appellee's Appendix, 33b.) The Michigan Department of Civil Rights dismissed the Plaintiff-Appellant's Complaint, determining that it had no merit. (Appellee's Appendix, 34b.) The Plaintiff-Appellant then filed the instant lawsuit and, following the close of discovery, the Defendant-Appellee moved for summary disposition. At argument on Defendant-Appellee's motion, defense counsel mentioned one example of Plaintiff-Appellant's lack of mature judgment that reflected badly on the Police Department and resulted in a two-day suspension for the Plaintiff-Appellant. The Plaintiff-Appellant has erroneously and repeatedly asserted that he was not promoted because of his suspension. There was no evidence in the record that the decision-maker in this case, Police Chief Thomas Pope, relied upon that particular incident in making his promotion decision. The reference to the incident was argument of counsel as an example of the lack of maturity on the part of the Plaintiff-Appellant. Argument of counsel does not constitute evidence.

Counsel for Plaintiff-Appellant objected to the raising of past discipline in argument and the trial court afforded him additional time to file a supplemental brief, taking the Motion for Summary Disposition under advisement. After receiving and reviewing the additional briefing on the matter, the trial court rendered a finding. The trial court's finding dealt with both the lack of background circumstances and the Plaintiff-Appellant's inability to demonstrate that the

explanation for the minority candidate's promotion was pretextual in nature. This is slightly different than how the Plaintiff-Appellant frames the issue in his brief.

The Plaintiff-Appellant's efforts in this case revolve around an asserted pretext for why he was viewed as lacking maturity, versus why the successful candidate was viewed as possessing maturity. The employment action involved in this case was the promotion of Arthur McClenney from patrol officer to sergeant. The stated reasons for his selection (maturity and his sense of service) needed to be addressed by the Plaintiff-Appellant by more than expressing indignation over his "superior" credentials being ignored. Nowhere in his brief does Plaintiff-Appellant rebut the fact that the decision-maker articulated and employed those two factors to separate out one individual for promotion from the top five. There is no evidence provided by Plaintiff-Appellant that Arthur McClenney did not possess maturity and a sense of service to the department.

Another issue handled in the trial court was a Motion for Reconsideration based upon information that the City Attorney learned of after oral argument on the Motion for Summary Disposition, but a month prior to a written finding by the trial court. In a February 7, 2000 letter to Plaintiff-Appellant's counsel, the City Attorney indicated that he had become aware of an Affirmative Action Plan, which, on its face, covered the time period of the 1996 promotions, but was never implemented by the City. (Appellant's Appendix, 17a.) The City Attorney felt that even at that late date, there was an ongoing duty to supplement the City's response to discovery requests.

After receiving the trial court's March 10, 2000 written opinion, Plaintiff-Appellant filed a Motion for Reconsideration Based upon an Abuse of Discovery, or in the Alternative, Leave to Amend its Complaint to Assert a Constitutional Violation of Its Equal Protection Rights, based

upon the Affirmative Action Plan. The City responded to the Motion and the Trial Court issued a Final Order denying the Motion for Reconsideration in May of 2000.

On appeal, the Michigan Court of Appeals affirmed the trial court's finding that the Plaintiff-Appellant did not: (1) present direct evidence of discrimination, (2) did not establish a *prima facie* case of reverse discrimination under the background circumstances test, and that in either case, summary disposition was appropriate because the legitimate non-discriminatory reason proffered by the decision-maker was not demonstrated by the Plaintiff-Appellant to be "pretextual to disguise discriminatory intent." (Appellant's Appendix, 33a.) The Court of Appeals never referred to the minority candidate as being "lesser qualified" as Plaintiff-Appellant suggests on page 14 of his Brief.

B. Facts

Qualifications for promotion within the Battle Creek Police Department are governed by a contract negotiated by the Collective Bargaining Unit for the patrol officers and the City. (Appellant's Appendix, 95a.) Promotions are a mandatory subject of bargaining under Public Employment Relations Act, MCLA 423.201 *et seq.* No matter what the degree of education or prior experience, a police officer may not be considered for promotion under the contract unless he or she has at least three years experience at the Battle Creek Police Department. A police officer is not qualified for promotion unless he or she obtains at least a 70% score on the written exam. A police officer is not qualified to be promoted regardless of education or prior experience or awards unless he or she is in the top five on the eligibility list. By contract, the Police Chief may select <u>any</u> qualified candidate for promotion. (Appellant's Appendix, 99a-100a) Only those candidates who are in the top five are deemed qualified for promotion. The minority candidate (Arthur McClenney) who was promoted was in the top five of the eligibility

list, and thus the Police Chief followed the promotional process as specifically negotiated by the Collective Bargaining Unit for the Plaintiff-Appellant.

Plaintiff-Appellant also asserts that other decisions were made within the Police Department on the basis of race. Plaintiff-Appellant cites the extension of the probation of Officer Renee Gray (a black female) as contrasted with the termination of Officer Matt Schimmel (a white male). Deputy Chief Kruithoff testified that extensions of probation are granted usually upon the joint decisions of the supervision sergeant and command staff (Appellee's Appendix, 12b, Kruithoff Dep., pp. 25-26). Ms. Gray's probation was extended 30 days because she had shown recent improvement. (Appellee's Appendix, 14b, July 23, 1997 Memorandum to Officer Gray from Commander Newman.) This stands in contrast to the termination of Matt Schimmel. He had been repeatedly warned about his driving; when he failed to correct his behavior, he was dismissed within the probationary period. (Appellee's Appendix, 13b, Kruithoff Dep., p. 29.)

Plaintiff-Appellant also complains that after filing the discrimination complaint with the Michigan Department of Civil Rights, the City did not promote him to resolve the issue. (Appellee's Appendix, 19b, Lind Dep., p. 34.) He asserts that his situation was analogous to that of a black female, Edwina Keyser, who was promoted to detective following the filing of a discrimination complaint with the Michigan Department of Civil Rights in 1988. Ms. Keyser's allegation of discrimination was based on an absence of black and female detectives and the contemporaneous promotion of two white men with lower qualifying scores and less seniority than herself. This contrasts with the promotion of other white males at the times Plaintiff-Appellant was being considered and the fact that the Michigan Department of Civil Rights did not find Lind's complaint to have merit. (Appellee's Appendix, 34b.)

SUMMARY OF ARGUMENT

The positions and arguments of the Defendant-Appellee in this matter are summarized as follows:

1. Plaintiff-Appellant failed to produce direct evidence of discrimination by Defendant-Appellee City in making the promotion decision at issue in this case.

2. The absence of direct evidence of discrimination required the lower courts to apply the shifting burden analysis of *McDonnell Douglas v. Green*, 411 US 792, 93 S Ct 1817, 36 L Ed 2d 688 (1973) in evaluating Defendant-Appellee's motion for summary disposition.

3. The "background circumstances" test is used to demonstrate a *prima facie* case of discrimination under the *McDonnell Douglas* analysis when discrimination is alleged by a white plaintiff.

4. The "background circumstances" test is consistent with and not violative of Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.

5. The "background circumstances" test is not violative of either the federal or Michigan equal protection clauses, US Const., amend XIV; Const 1963, art. I, §2.

6. Plaintiff-Appellant failed to produce evidence of "background circumstances" that Defendant-Appellee City is the unusual employer who discriminates against the majority.

7. Defendant-Appellee recognizes that the "background circumstances" test has been the subject of judicial criticism prompting Defendant-Appellee to propose the "neutral factor" test as a modification to the *McDonnell Douglas* shifting burden analysis.

8. Upon demonstration of a *prima facie* case due to "background circumstances" or "neutral factor" tests, the *McDonnell Douglas* analysis shifts the burden to Defendant-Appellee to articulate a non-discriminatory reason for its employment decision.

9. Plaintiff-Appellant failed to provide any evidence that the proffered non-discriminatory reason for the promotion decision in this case was pretextual, to show that it was both false and that the decision was motivated by an intent to discriminate.

10. Defendant-Appellee was properly granted summary disposition by the trial court and this Court is requested to apply the *McDonnell Douglas* analysis modified by either the "background circumstances" test or "neutral factor" test and affirm the decision of the Court of Appeals.

ARGUMENT I

PLAINTIFF-APPELLANT DID NOT DEMONSTRATE "DIRECT EVIDENCE" OF REVERSE DISCRIMINATION SO AS TO DEFEAT DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION

This is a case alleging "reverse discrimination" in the employment context. The Supreme Court in *DeBrow* v *Century 21 Great Lakes, Inc.*, 463 Mich 534, 620 NW2d 836 (2001), said that intentional discrimination can be proven by direct and circumstantial evidence. Plaintiff-Appellant argues that the Court of Appeals wrongfully applied a narrow definition of "direct evidence."

The Michigan Supreme Court recently clarified the manner in which a plaintiff may prove a discrimination claim under the Elliott-Larsen Civil Rights Act (ELCRA), noting first that a plaintiff with direct evidence that an employment decision was the product of racial bias "can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v. Ford Motor Co.*, 464 Mich 456, 462; 628 NW2d 515 (2001). See also *DeBrow v. Century 21 Great Lakes, Inc. (After Remand)*, 463 Mich 534, 537-539; 620 NW2d 836 (2001). In this context, "direct evidence" means "'evidence which, if believed, requires the conclusion that unlawful discrimination was <u>at least a motivating factor</u> in the employer's

actions.'" *Id.* quoting *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F3d 921, 926 (CA 6, 1999). Accordingly, a plaintiff with direct evidence of discriminatory motive has provided sufficient evidence to permit an inference of discrimination and allow the case to go to a jury unless the defendant produces evidence on which reasonable minds would not differ in the conclusion that the employer would have taken the same action even absent the unlawful motivation.

Plaintiff-Appellant asserts that the Court of Appeals decision in this matter erroneously defined "direct evidence" so as to require a confession by the decision-maker that he or she was motivated to discriminate on the basis of race in making the employment decision at issue. Plaintiff-Appellant attempts to assert a demonstration of direct evidence of a motivation to discriminate in this case based on remarks of the Deputy Police Chief concerning an alleged promotion decision involving a black female. Plaintiff-Appellant also points to the decision in *Herendeen* v *Michigan State Police*, 39 F2d 899 (W.D. Mich 1999) as being strikingly similar to the facts herein. Plaintiff-Appellant's reliance upon a grieved work assignment, not a promotion, and the facts in the *Herendeen* case are misplaced.

A. Absence of Remarks by Chief Pope

Direct evidence does not require a confession by the decision-maker that he or she was motivated to discriminate on the basis of illegal criteria. Rather, there must be direct evidence, which, if believed, permits the conclusion that unlawful discrimination was a motivating factor in the employer's actions. See *Hazle, supra*; *citing Jacklyn, supra,* and *Harrison v. Olde Financial Group,* 225 Mich App 601; 572 NW2d 679 (1997).

The "direct evidence" in the *Harrison* case was testimony from the plaintiff that she overheard staff attorneys interviewing her indicating that she was "the wrong color" and while

leaving a second interview overheard the personnel director advise the defendant's corporate counsel that he should not permit plaintiff to address him by his first name because plaintiff was black. These examples were not "confessions" of animus, but statements from the decision-makers directly commenting on the plaintiff's race which, if believed, indicate that the plaintiff's race played a role in their actions. Remarks by a policy or decision-maker are necessary to show direct evidence of discriminatory motive. In *DeBrow*, *supra*, plaintiff indicated that his supervisor told him that he was "getting too old for this shit." In the *DeBrow* case, this Court held that the remark presented direct evidence of unlawful age discrimination. Again, this is comment directly concerning the plaintiff, made by the decision-maker in that case. Plaintiff-Appellant cannot point to any remarks by Chief Pope, the decision-maker in this case disparaging of Plaintiff-Appellant, or white police officers. Nor is there evidence that Chief Pope expressed a preference for a minority when making the promotion decision at issue.

In *Herendeen*, *supra*, much reliance was placed upon the testimony of Colonel Michael Robinson who stated that "race and gender are factors to be considered each and every time there is a promotion." [Emphasis supplied.] *Herendeen, supra*, at 904. These statements by the chief policy-maker for the Michigan State Police were direct evidence that race and gender were to be motivating factors in promotion decisions. The remarks in question were deemed to manifest an expectation that lower-level state police administrators were to take race and gender into consideration when making decisions. Plaintiff-Appellant cannot point to any remarks by Chief Pope invoking a similar mandate for making promotion decisions within the Battle Creek Police Department. Unlike Colonel Robinson, Chief Pope specifically denied taking race into consideration when making assignments and promotions. (Appellee Appendix, 5b, 41b, Pope Dep., pp. 36, 41.)

B. Alleged Remarks by Deputy Chief Kruithoff

Statements by decision-makers used by plaintiffs as direct evidence must nevertheless be admissible. In *Jacklyn*, the court held that inadmissible hearsay evidence of discriminatory animus was properly excluded. In that case, a regional manager allegedly made a remark to a non-plaintiff witness that he did not like "skirts" working for him. The witness denied hearing the remark or repeating it to the plaintiff. The remark was held to be inadmissible under FRE 801 and FRE 805.

In this case the alleged comments of Deputy Chief Kruithoff concerning the assignment of Dian Cantrell as an aide in the Chief's office are likewise inadmissible. Plaintiff-Appellant seeks to use the testimony in another case by David Walters and an affidavit by David Adams, which purportedly indicate that Kruithoff admits that Cantrell got the work assignment because she is a black female. This evidence was adduced during a labor grievance regarding the assignment. However, at the time the assignment was made, in July of 1994, there was no allegation or complaint that the assignment of Officer Cantrell was improperly motivated by race. The grievance was brought solely because Officer Cantrell remained on temporary assignment in excess of six months. (Appellee's Appendix, 29b.) As was noted by the arbitrator's decision, the grievance concerned not the initial assignment, but the extension of the six-month term limit on filling special assignments and returning Officer Cantrell to the administrative aid role after a temporary departure. This was determined to be a violation of the Collective Bargaining Agreement. The remarks of the arbitrator concerning reputed remarks of the Deputy Chief that Ms. Cantrell's race and gender played a role in her assignment are clearly dicta, as it did not concern an interpretation of the Collective Bargaining Agreement as to how

long an individual may remain in a position for a work assignment without violating the Collective Bargaining Agreement.

Kruithoff denied the characterization made by Walters and Adams of his remarks and Kruithoff denied that race or gender played a role in who got the assignment (Appellee's Appendix, 11b, Kruithoff Dep., pp. 21-22). Because Kruithoff's out-of-court statement as testified to by Adams and Walters, is being offered for the truth of the matter asserted, it must fall within a hearsay exception to be admissible. However, to be admissible, the statement must be relevant and material, MRE 401. As noted by the Court of Appeals in their decision, these remarks did not concern a similar position within the department, did not involve the promotion decision at issue, and were not made by Chief Pope who made the decision in this matter. (Appellant's Appendix, 32a.) As such, this evidence was not relevant. The facts surrounding the alleged remarks of Kruithoff regarding the Cantrell assignment are unlike the facts in *Talley v. Bravo Patino Restaurant, Ltd.*, 61 F3d 1241 (CA 6, 1995), a case cited by Plaintiff-Appellant where disparaging racial comments were frequent, but more akin to those in *Jacklyn, supra.*

In this case there is no direct evidence in the form of remarks by Chief Pope to indicate that he used or relied upon unlawful factors in making the promotion decision at issue in this case. Given the absence of direct evidence, the lower courts were required to apply the *McDonnel Douglas* shifting burden analysis to evaluate Defendant-Appellee's Motion for Summary Disposition.

ARGUMENT II

PLAINTIFF-APPELLANT DID NOT DEMONSTRATE "INDIRECT EVIDENCE" OF REVERSE DISCRIMINATION SO AS TO DEFEAT DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION

A. Indirect Evidence Standard.

As noted by the Court in *Hazle, supra,* when no direct evidence of impermissible bias exists, in order to avoid summary disposition, the plaintiff must proceed through the steps set forth in *McDonnell Douglas,* supra. As was indicated by this Court in *Town* v *Michigan Bell Telephone*, 455 Mich 688, 568 NW2d 64 (1997), the *McDonnell Douglas* framework is used for evaluating cases of racial discrimination. In the context of a reverse discrimination claim, the *McDonnell Douglas prima facie* test has been modified by the Michigan Court of Appeals. See *Allen, supra*. In the absence of direct evidence of discrimination, a plaintiff in a reverse discrimination suit based on race must establish a *prima facie* case of discrimination by showing: (1) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority; (2) that the plaintiff was qualified for the promotion; (3) that despite the plaintiff's qualifications, he was not promoted; and (4) that a minority employee of similar qualifications was promoted.

The *McDonnell Douglas prima facie* standard is met when a plaintiff demonstrates that the actions taken by the employer, if such action remains unexplained, permit the inference that it is more likely than not that such actions were based on an illegal discriminatory criterion. *Furnco Construction Corp. v. Waters*, 438 US 567; 98 S Ct 2943; 57 L Ed 957 (1978). By meeting this burden, plaintiff does not necessarily overcome a motion for summary disposition; rather it merely creates a rebuttable presumption that the defendant acted with discriminatory intent. *Hazle supra,* at 463-464.

If the defendant articulates a legitimate, non-discriminatory reason for its decision, the presumption of discriminatory intent falls away and the burden shifts back to the plaintiff to demonstrate a question of material fact that the employer's articulated reason is a pretext for discrimination. *Hazle, supra,* at 464-465.

In this case, for purposes of summary disposition only, Defendant-Appellee conceded the existence of the last three elements of the *McDonnell Douglas* test as applied in the reverse discrimination context. However, Defendant-Appellee vigorously asserted that the Plaintiff-Appellant failed to establish the first element, background circumstances supporting the suspicion that the Defendant-Appellee is the unusual employer who discriminates against the majority.

B. Plaintiff-Appellant failed to produce indirect evidence of discrimination.

Plaintiff-Appellant asserts, based on several instances of perceived favoritism, that substantial evidence of "background circumstances"[1] was demonstrated. For the reasons that follow, both the trial court and the Court of Appeals correctly determined that "background circumstances" were not present in this case.

Plaintiff-Appellant initially argues that the work assignment of a black female to an administrative aide position within the police department provides indirect evidence of reverse discrimination. Due to the vastly different factual circumstances surrounding the assignment of Officer Cantrell and the promotion of Arthur McClenney, Plaintiff-Appellant's reliance upon the former situation does not indicate that Chief Pope exhibited discriminatory animus toward white men. Despite Plaintiff-Appellant's attempts to portray Deputy Chief Kruithoff as the actual

[1] Throughout this Brief the Defendant-Appellee, with the Court's indulgence, will use the term "background circumstances" to mean suspicion that the Defendant-Appellee is the unusual employer who discriminates against the majority.

decision-maker, there is no doubt in this case that Chief Pope, not Deputy Chief Kruithoff, made the decision to promote Arthur McClenney.

As argued previously, the remark of Deputy Chief Kruithoff, as reported by union officials Adams and Walters, is inadmissible hearsay. More importantly, there is nothing in the record of this case or the grievance hearing, which discloses that there were equally qualified white male employees who were discriminated against when the administrative assignment was made.

Finally, the actual testimony of David Walters (Appellant's Appendix, 178a, Walter's Dep., p. 33) falls short of demonstrating discriminatory animus on the part of the Deputy Police Chief. The testimony is not unequivocal, it is just as capable of being interpreted that Kruithoff was pleased, after the appointment, that having a minority female as a liaison with the public was working out better than anticipated. Further, it appears from Walter's testimony that Cantrell's experience as a clerk for a judge was an important factor in her appointment. It is ironic that the Plaintiff-Appellant complains that Chief Pope should have promoted him due to his "superior qualifications" but when Pope makes an assignment of a minority with qualifications suited to the position the action discloses a racial animus. In short, the evidence relied upon concerning Kruithoff's remarks about the Cantrell assignment is merely post hoc, ergo propter hoc reasoning by Plaintiff-Appellant.

Plaintiff-Appellant also asserts that his qualifications are superior to those of Arthur McClenney.[2] However, Plaintiff-Appellant mischaracterizes what the law requires. The issue is

[2] Although Michael Lind attended law school at night and obtained a law degree during the pendency of this case, he had not even started law school when the promotion was made. He specifically alleges that the minority candidate had and still has no college education. (Plaintiff's Brief, page 30.) That is false, Sgt. Arthur McClenney has a Bachelor of Arts in Law Enforcement, which was obtained during the pendency of this lawsuit.

not whether Plaintiff-Appellant was more qualified, the issue is whether Arthur McClenney was qualified for promotion. In this regard there are no assertions by the Plaintiff-Appellant that, for purposes of the 1994 Sergeant Eligibility List, Arthur McClenney had not undergone the same process as the Plaintiff-Appellant to qualify for placement on the promotion list.

This is a case totally dissimilar to *Herendeen* because minority and female candidates for promotion were actually bumped up to a band that their "test scores" did not otherwise qualify them to be in. In the instant case, the minority candidate was not bumped up into the Rule of Five, rather his test scores placed him there.

Further, at the time the decision was made, Arthur McClenney was within the group of five persons eligible for promotion.[3] As testified by Chief Pope, he viewed all five as equally qualified for promotion. (Appellee's Appendix, 4b, Pope Dep., p. 30.) Additionally, in sworn testimony in another case, Michael Lind admitted that Arthur McClenney was "probably a good sergeant, he's probably capable of doing the job, and he might have been better than me." (Appellee's Appendix, 23b, Lind Dep. in *Adams* v *City of Battle Creek*, pp. 39-40). As noted by the Supreme Court in *Town*, *supra*, Plaintiff-Appellant's argument is more focused on the soundness of Chief Pope's selection of one competent employee over another as opposed to background circumstances indicating discriminatory animus toward white officers.

Plaintiff-Appellant's third asserted evidence of background circumstances is the decision by Chief Pope not to promote in rank order down the Eligibility List. Plaintiff-Appellant baldly asserts at page 31 of his Brief, "It was not until the McClenney promotion that the City began skipping over those candidates with higher scores." Plaintiff-Appellant asserts this was a break with past practice. These assertions are flat-out wrong and contrary to the facts.

[3] McClenney moved into the five-person promotion pool because Bobby Quarles (a minority male) was terminated from the Police Department in May 1995.

Due to a lawsuit brought by the police officers' union, Chief Pope was required to make several promotions from the 1994 Eligibility List before it expired. The Collective Bargaining Agreement did not require the Chief to go down the promotional list in rank order. Rather, the Chief was permitted to make his choice from the five highest qualifiers. After he made a choice, the next name on the list moved into the pool of five eligible officers. This "Rule of Five" was specifically affirmed in the settlement of the union's lawsuit. Although by operation of circumstances promotions might occur in rank order, Chief Pope testified that he did not make it a practice to go down the list. (Appellee's Appendix, 3b-4b, Pope Dep., pp. 28-31.) So while the first five promotions from the 1994 list occurred in the order in which the candidates qualified, the next three did not. The sixth promotion was Debbie Tuyls (white female), the seventh was David Draper (white male), and the eighth was Arthur McClenney (black male). Tuyls had a lower qualifying score than Draper and both Draper and Tuyls had lower scores than Victor Pierce (Asian male). Thus, Plaintiff-Appellant's assertion that it was not until the McClenney promotion that the City began skipping over candidates with higher scores is not factually correct. Nor had Chief Pope make promotions in sequential order from the 1992 Sergeant Eligibility List. The order of those promotions and their place on the list was: Pierce (1) Alspaugh (3), Bright (2), and Sherzer (5).[4] (Appellee's Appendix, 26b.) As such, the assertion that promotions had taken place in rank order until the McClenney selection is not true and does not demonstrate "background circumstances."[5]

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[4] With the exception of Pierce, who is Asian, the promotions from the 1992 List were made of white males. The promotion of Sherzer is noteworthy as he by-passed Quarles, a black officer.

[5] The promotions from the 1996 list also fail to support Plaintiff-Appellant's argument. Prior to his retirement, Pope promoted Penning, the first name on the list. Kruithoff was named Chief, and contrary to the claim that he promised to promote in rank order, the next promotions were Felix, Saylor and Kendall. The promotion of Kendall, a white officer, is noteworthy as Plaintiff-Appellant was again by-passed by a lower qualifier. (Appellee's Appendix, 20b, Lind Dep. pp. 40-41.)

Finally, the three promotions that were made contemporaneously to Arthur McClenney's resulted in the promotion of three white individuals, Mehl, Draper, and Tuyls. In the promotion of Draper and Tuyls, the Chief bypassed Victor Pierce, an Asian-American. (Appellee's Appendix, 18b, Lind Dep., p. 32.) These contemporaneous promotions to the one that is the source of Plaintiff-Appellant's Complaint belie the assertions of Plaintiff-Appellant that Chief Pope used race as a factor in his promotion decisions, or that Pope followed the sequential order of the promotion list until McClenney's promotion.

Plaintiff-Appellant asserts in his brief that the Michigan Court of Appeals based its decision in this matter on the fact that other white applicants had been promoted. Plaintiff-Appellant asserts that this conflicts with the Court's decision opinion in *Laitinen* v *City of Saginaw*, 213 Mich App 130; 539 NW2d 515 (1995). At issue in *Laitinen* was a single position as plant maintenance supervisor at a City of Saginaw wastewater treatment plant. The white plaintiff was the second highest scoring candidate for the job. The highest scoring candidate was also white. The job was given to the only black candidate on the eligibility list. The Court of Appeals reversed the trial court's dismissal of the case ruling that the Plaintiff still had standing to bring suit even though he might not have been awarded the job.

The Court of Appeals in this case did not hold that Michael Lind had no standing to bring his complaint because other white officers in the eligibility pool may have been selected over him. Rather, the court relied upon the contemporaneous promotion of other white officers as evidence indicating that the City was not the unusual employer who discriminated against the majority. As such, the Court of Appeals decision is not in conflict with the *Laitinen* decision.

Plaintiff-Appellant also asserts a conflict with the United States Supreme Court in its decision in *Reeves* v *Sanderson Plumbing Products*, 530 US 133, 120 S Ct 2097, 147 L Ed 2d

105 (2000). In that case, the employer in an age discrimination case provided evidence of a non-discriminatory reason for the plaintiff's discharge, i.e., "shoddy record keeping." However, petitioner made a substantial showing that the employer's explanation was false by offering evidence of properly maintained attendance and time-keeping records and providing a plausible rationale for many of the asserted time-keeping errors cited by the employer. These explanations were corroborated by an agent of the employer. In this case, Plaintiff-Appellants proffered no evidence that the decision of Chief Pope that Arthur McClenney showed more maturity and had a better sense of service was pretextual or erroneous. The Plaintiff-Appellant merely rails on the assertion that the City used Plaintiff-Appellant's disciplinary record for its decision.

There is nothing in the record that indicates that Chief Pope recalled or relied upon 1990 discipline of Lind to support his decision. Rather, the 1990 suspension was referenced by the Defendant-Appellee's counsel in oral argument, which is not evidence, to buttress the conclusion made by Pope that McClenney displayed maturity and had a greater sense of service to the department as opposed to Lind's ill advised attempt at humor, which tended to put police officers and the department he served in a poor light. As Plaintiff-Appellant failed to adequately contest the non-discriminatory reason for the decision made by Chief Pope, the opinion of the Court of Appeals does not conflict with the *Reeves* decision of the United States Supreme Court.

Plaintiff-Appellant also asserts that because the promotion was based on subjective factors, that, when combined with other factors, such is sufficient to establish a *prima facie* case. Plaintiff-Appellant's argument misses the mark. The decision of Chief Pope was the result of separate interviews with each candidate. (Appellee's Appendix, 3b, Pope Dep. pp. 27-28.) In that interview Pope sought to determine how supportive each candidate would be of supervisors,

what they thought of management, how supportive they would be of the police administration, why the candidate wanted to be promoted, their motivation for being promoted, and how they could be a positive influence in the organization. (Appellee's Appendix, 4b, Pope Dep. p. 32.) Pope considered each of the officers within the pool of five to be a qualified candidate for promotion. The Collective Bargaining Agreement did not require the Chief to review personnel files, consider a candidate's educational achievements, department commendations or disciplinary history in making promotion decisions. In fact, Pope testified that it was his practice not to review this type of material in making his promotion decisions. In general terms, Chief Pope was looking for someone who would be a good fit to his management team and philosophy. Individual education and awards were not determining factors as to whether to promote someone.

Specifically, regarding the decision to promote Arthur McClenney, Chief Pope testified he was impressed with his maturity and sense of service. On the other hand, the sense he received from the Plaintiff-Appellant during their discussion was that Lind felt that the promotion was "owed to him." (Appellee's Appendix, 6b, Pope Dep. p. 37.) More importantly, in making the promotion decision at issue in this case, there is nothing to indicate that Chief Pope did anything out of the ordinary or inconsistent when compared to the earlier promotion decisions. As Pope put it in his deposition:

> [W]henever you select from five and pick one, you have one very happy person who feels it was absolutely the right decision, and you have four pissed-off people who feel that the decision was the worst that could ever be made. (Appellee's Appendix, 6b, Pope Dep. 39.)

The use of subjective factors, particularly in determining a fit with management and who the Chief thought best to carry out his philosophy of policy, should not be suspect. These are

attributes that cannot be measured. As such, the decision-making process, which was applied to all five officers by the Chief, does not create "background circumstances."

Under the Collective Bargaining Agreement, the five officers in the pool for promotion were considered equally qualified. Pope did not look at the employment records of any of the officers before making his decision and granted each of them an oral interview. Unlike circumstances in *Bishopp v. District of Columbia*, 788 F2d 781, 786 (CA D.C., 1986) in which there was an absence of a formal selection process, the City of Battle Creek had in place a promotional process governed by the Collective Bargaining Agreement which did not require the police chief to utilize awards, education or experience in making promotional decisions. Further, each of the candidates was offered an interview with the Chief prior to the promotion decision being made.

There is nothing to indicate that there was any abbreviation of the selection process, nor is there any indication that at the time of the promotion Arthur McClenney was not a qualified candidate. There is no evidence in the record, to cast doubt on the use of subjective criteria in making the promotion decision. In this regard, this case mirrors the decisions in *Imhof* v *Metropolitan Life Insurance Company*, 858 F Supp 91 (ED Mich 1994) and *Rivette* v *U S Postal Service*, 625 F Supp 768 (ED Mich 1986).

The plaintiff in *Imhof, supra,* sought to rely upon his greater seniority and position so as to demonstrate discriminatory animus. However, the court noted that the criteria relied upon by the plaintiff was not used in making the promotion decision. Instead, the four female employees chosen instead of the plaintiff were said to have better leadership and interaction skills. The court found nothing inherently suspect in the use of these subjective criteria by the employer in making the promotion decision. While Plaintiff-Appellant claims his experience and education

better qualified him to be a sergeant; such reliance was misplaced, as Chief Pope did not use those criteria in making his decision.

In *Rivette*, candidates for a supervisory position were interviewed by a four-member panel. The court noted that a disastrous interview could easily preclude a candidate from consideration and found a persuasive testimony that during the interview the plaintiff evidenced an attitude that he did not need to prepare for the interview because he felt that he was heir apparent to the position. In *Rivette* the interviewers were looking at several subjective qualities such as poise, leadership, team building, and problem solving. Thus, Chief Pope's reliance upon subjective criteria for prospective members of his command staff was not flawed and the attitude evidenced by the Plaintiff-Appellant, that he felt the position was owed to him, worked against him in the interview process.

Plaintiff-Appellant also asserts the earlier promotion of a black female, Edwina Keyser, to a detective position; the extended probationary period of a black female, Renee Gray, and a purported Affirmative Action policy were all indications of background circumstances of reverse discrimination. Again, Plaintiff-Appellant's reliance upon these circumstances is misplaced. These circumstances are not analogous to Plaintiff-Appellant's claims. Moreover, the fact that the City must defend those decisions, in some cases years after they were made, points to problems with the "background circumstances" test from the perspective of the employer-defendant.

In 1989 Edwina Keyser, a black female police officer, was promoted to a detective position after she filed a complaint with the Michigan Department of Civil Rights. She demonstrated both an absence of blacks and females in the detective service and that the City had selected two white male candidates for promotion to detective with lower qualifying scores.

Keyser, having made a *prima facie* case under the *McDonnell Douglas* test, settled the matter with the City through the Michigan Department of Civil Rights. In 1996 Michael Lind filed a complaint with the Michigan Department of Civil Rights. However, in his case the Michigan Department of Civil Rights determined that there was insufficient evidence to support his allegations. The fact is that a state agency charged with the responsibility of overseeing the administration of civil rights claims did not find the two cases analogous. The fact that the City resolved one civil rights dispute with a black female who demonstrated a *prima facie* case of discrimination in 1989, and that it failed to settle Plaintiff-Appellant's claim in the absence of demonstrating a *prima facie* case in 1997, is not indicative evidence of reverse discrimination. However, it is evidence that Chief Pope did not necessarily promote in rank order.

The decision to extend the probationary period of a new officer is unrelated to the issue of promotion. Specifically, the extension of Officer Renee Gray's probationary period, which took place after the promotion decision involved in this case and was made by Kruithoff, Pope's successor as Chief, is not relevant evidence concerning the promotion decision made by Chief Pope.

During her probationary period, Officer Gray had exhibited inconsistent performance, but the memo to her indicates, (Appellee's Appendix, 14b, Newman memo) she had demonstrated recent improvement and her probation was extended 30 days. As Kruithoff testified, about one in ten probationary periods are extended. (Appellee's Appendix, 12b, Kruithoff Dep., p. 26.)

Chief Kruithoff discharged probationary officer Matt Schimmel because, despite several attempts to correct his driving habits, he continued to engage in driving behavior that placed in danger the lives and property of himself and others. Specifically, after being counseled regarding his driving, Schimmel was observed driving over 80 miles an hour past the police station in

response to a call outside of his patrol district. On one hand the police department was faced with an officer whose inconsistent performance was improving; on the other was an officer who, after being counseled concerning his driving, inappropriately responded to a call at over 80 miles an hour past the police station. The comparison is, at most, anecdotal evidence reflecting Plaintiff-Appellee's perception of unequal treatment. As such, this is not relevant evidence of background circumstance of reverse discrimination.

Finally, Plaintiff-Appellant asserts the presence of an unadopted Affirmative Action Plan as evidence of background circumstances. At the time of the promotion decision at issue in this case, the City of Battle Creek had no Affirmative Action Plan in place. (Appellee's Appendix, 39b-40b, Taylor Affidavit.) There was no pressure on the Police Chief to promote minorities and the City did not rely upon the presence of an Affirmative Action plan to defend the promotion of McClenney. Witnesses on behalf of the City consistently presented testimony that no Affirmative Action plan was in place. The claim by Plaintiff-Appellant at page 33 of his Brief that the Affirmative Action Plan was approved by the City Council (sic) is false. The plan, which had been approved by the Michigan Department of Civil Rights, was never presented to nor adopted by the Battle Creek City Commission. As such, the situation is unlike that in *Herendeen* and is not therefore indicative of background circumstances.

For all of the above reasons, Plaintiff-Appellant failed to demonstrate the existence of background circumstances supporting the suspicion that the City of Battle Creek was the unusual employer who discriminated against the majority. Plaintiff-Appellant attempted to demonstrate his belief that blacks were treated more favorably than whites through isolated and falsely perceived incidents and circumstances. However, even Plaintiff-Appellant admits that McClenney is "probably capable of doing the job" and "might have been better than me." Pope

was looking for someone whose philosophy fit with his idea of police command; the fact that Lind may have been a better-than-average police officer did not necessarily mean that he was a good candidate for command. As noted by this Court in *Town, supra,* such a showing will not survive a motion for summary disposition. Plaintiff-Appellant failed to demonstrate background circumstances indicating that discriminatory animus motivated Chief Pope in making the decision to promote Arthur McClenney instead of Plaintiff-Appellant.

ARGUMENT III

THE "BACKGROUND CIRCUMSTANCES" PRONG IMPOSED BY *ALLEN* IN EVALUATING "REVERSE DISCRIMINATION" CLAIMS IS CONSISTENT WITH THE CIVIL RIGHTS ACT, MCL 37.2101, *ET SEQ.*

Consistent with Michigan statutory law, and the goal of the Legislature, the lower court correctly applied established state precedent in applying the "background circumstances" method of proof in actions alleging reverse discrimination under Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.* (ELCRA). As detailed below, in determining whether a discrimination case under the ELCRA will reach the jury the methods of proof to establish a *prima facie* case will inevitably differ depending on the type of discrimination alleged and the factual scenario. This does not mean that differing methods of proof are inconsistent with the ELCRA. Quite the contrary. The case law interpreting the ELCRA requires a tailoring of the methods of proof to address the form of discrimination and the factual basis of the case. Moreover, the "background circumstances" prong is only applied in cases with no direct evidence of discrimination, and merely assists such plaintiffs in setting forth facts sufficient to support an inference of discrimination.

A. Michigan's Shifting Burden Approach to Analyzing Cases Alleging Discrimination under the ELCRA is Consistent with the Goal of the Legislature.

Both the federal and Michigan civil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of the class to which the person belongs. *Miller v. C.A. Muer Corp.*, 420 Mich 355, 362-363; 362 NW2d 650 (1984). Michigan's ELCRA is specifically aimed at "the prejudices and biases" borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Id.* at 363. Because the order and allocation of proof is not listed in either the federal or Michigan civil rights acts, courts have adopted burden-shifting tests that vary depending on the substantive and factual circumstances of the specific charge of discrimination.

A plaintiff without direct evidence of discriminatory motive instead proceeds through the three steps of the shifting burden approach set forth in *McDonnell Douglas*, *supra*.. *McDonnell Douglas* held that a Title VII complainant satisfies the initial burden of establishing a *prima facie* case of discrimination by showing that:

(i) [plaintiff] belongs to a racial minority;

(ii) he applied and was qualified for a job for which the employer was seeking applicants;

(iii) despite his qualifications, he was rejected; and

(iv) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* at 802.

Because the ELCRA is modeled after Title VII, Michigan courts regularly turn to Title VII federal case law for guidance. See *Radtke v. Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993); *Summer v. Goodyear Tire & Rubber Co.*, 427 Mich 505, 525; 398 NW2d 368 (1986); *Hazle*, *supra*.

The Michigan Supreme Court first adopted the *McDonnell Douglas* test in *Matras v. Amoco Oil Co.*, 424 Mich 675; 385 NW2d 586 (1986), an age discrimination case involving a reduction in workforce. The Court explained that the test it developed was simply a tool used to measure whether the plaintiff had produced sufficient evidence for reasonable jurors to conclude that age discrimination was a determining factor in the adverse employment action. *Id.* at 682-683. Furthermore, the Court adopted the *McDonnell Douglas* logic that the tests used to measure the evidence would necessarily be adapted to take into consideration the innumerable forms of discrimination, and the varying factual situations involved. *Id.* at 684. Under any formulation of the test, the ultimate question is whether the plaintiff's protected status was a determining factor in an adverse employment action. *Id.* at 682-683.

Michigan courts explain that a "*prima facie* case" in the *McDonnell Douglas* context means only that the plaintiff has provided enough evidence to create a rebuttable presumption of discrimination. *Hazle*, 464 Mich at 464. It does not mean that the plaintiff has provided sufficient evidence to allow the case to go to the jury. *Id.* In *Hazle*, the Michigan Supreme Court reiterated the three-step shifting burden analysis:

1. A plaintiff has the initial burden of demonstrating the elements of a *prima facie* case of discrimination;

2. If the plaintiff succeeds in establishing a *prima facie* case, a burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the defendant's action;

3. Once the defendant does so, the plaintiff must come forward with sufficient evidence to permit a reasonable trier of fact to conclude that unlawful discrimination was a motivating factor in the employer's decision, i.e., a plaintiff must raise a triable issue of fact that the defendant's proffered reasons were pretext for discrimination.

Throughout the application of the three-step analysis, the ultimate burden of persuasion remains at all times with the plaintiff to prove discrimination. *St. Mary's Honor Center v. Hicks*,

509 US 502, 510-511; 113 S Ct 2742; 125 L Ed 2d 407 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 US 248, 253-254; 101 S Ct. 1089; 67 L Ed 2d 207 (1981); *Chambers v. Trettco*, 463 Mich 297, 316; 614 NW2d 910 (2000).

In the instant case, the lower courts properly utilized the elements of a *prima facie* case under the shifting burden approach that, pursuant to established federal and state precedent, was properly tailored for claims of alleged "reverse" race discrimination. The fact that the methods of proof will inevitably differ in determining whether a jury will hear the merits of a discrimination case does not mean that differing methods of proof are inconsistent with the ELCRA. Instead, both precedent and logic require a tailoring of the methods of proof to address the form of discrimination and the factual basis of the case. The background circumstances test simply allows courts to determine whether the plaintiff has produced sufficient evidence, and thereby has "eliminated the most likely legitimate causes for the employer's adverse action." *Matras*, *supra,* at 684. See also, *Burdine*, *supra.*

B. The "Background Circumstances" Test Allows Courts to Accurately Measure Whether Plaintiff-Appellant Has Produced Sufficient Evidence to Support an Inference of Discrimination.

The United States Supreme Court has described the burden-shifting standard "as a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra,* at 2949-50. In *Parker v. Baltimore & Ohio RR. Co.*, 652 F2d 1012 (DC Cir 1981), the court noted that the *McDonnell Douglas* test had been modified by courts for use in a reverse discrimination case where the "legacy of hostile discrimination" or "common experience" of discrimination is not present.

The rationale for modifying the measure of evidence in reverse discrimination cases was explained in *Parker, supra,* at 1017:

The original *McDonnell Douglas* standard required the plaintiff to show "that he belongs to a racial minority." Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the "light of common experience" would lead a fact finder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white coworkers in our present society.

Thus, "majority" plaintiffs may rely on the *McDonnell Douglas* criteria to prove a *prima facie* case of intentionally disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority. *Id.*

A requirement that a member of a traditionally favored class set forth facts that would support the suspicion that the employer might be in the rare category of employers that discriminates against that class does not impose a heightened burden on those pursuing what have become known as "reverse discrimination" claims. Instead, that requirement merely adjusts the *McDonnell Douglas prima facie* case to fit the circumstances so that meeting the requirements can be fairly said to give rise to an inference of discrimination.

In *Allen* v *Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997), the Court of Appeals considered a case of "reverse gender" discrimination, and recognized that the original *McDonnell Douglas* formulation required the plaintiff to be a member of a racial minority. The Court accepted the reasoning that membership in a socially disfavored group was part of the basis for inferring discriminatory motive in the unexplained disparate treatment of an otherwise similarly situated individual. In doing so, the Court modified the *McDonnell Douglas* test to require a reverse discrimination plaintiff who has no direct evidence of discriminatory intent to establish a *prima facie* claim of gender discrimination under the ELCRA with respect to a promotion decision by showing: (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against them; (ii) that the plaintiff applied

and was qualified for an available promotion; (iii) that, despite plaintiff's qualifications, he was not promoted; and (iv) that a female employee of similar qualifications was promoted. *Allen, supra* at 433. Because there is nothing differentiating the protections from discrimination afforded under the ELCRA that would make the "background circumstances" test inconsistent with the ELCRA yet consistent with Title VII, the Court of Appeals properly turned to Title VII case law for guidance in adopting this test. Additionally, the *Allen prima facie* analysis is in conformity with the Sixth Circuit's formulation. See *Boger v. Wayne County,* 950 F2d 316, 325 (CA 6, 1991)(when there is "a claim by a white person that the employer discriminated in favor of a member of a racial minority, the presumption that the circumstances which normally make out a *prima facie* case are indicative of discrimination is not available, absent a showing that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." [citations and internal quotation marks omitted]). See also, *Weberg v. Franks*, 229 F3d 514 (CA 6, 2000). Indeed, this test has been utilized by the Sixth Circuit for 17 years. See *Murray v. Thistledown Racing Club, Inc.*, 770 F2d 63 (CA 6, 1985) ("As with the minority plaintiff, the majority plaintiff who asserts a claim of racial discrimination in employment does so within the historical context of [Title VII]. "Reverse discrimination" claims require application of a *McDonnell Douglas* standard modified to reflect this context as well as the factual situation of the claim.").

The rationale behind the *McDonnell Douglas* test incorporates a presumption that an employer's acts, unless otherwise explained, are likely to be based on impermissible factors. *Furnco, supra*, 438 US at 577. In reverse discrimination cases, however, courts in several jurisdictions have properly concluded that inferences associated with historical patterns of discrimination do not apply when the plaintiff is a member of a group that has not been

historically discriminated against. Under these circumstances, courts require the plaintiff to advance some reason to suspect that the employer is the "unusual employer who discriminates against the majority." *Bishopp v. District of Columbia*, 788 F2d 781, 786 (CA D.C., 1986)("A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such socially disfavored groups to give rise to an inference of discriminatory motivation. White males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them.")(quotations, citations, and alterations omitted); *Harding v Gray*, 9 F3d 150, 153 (CA D.C., 1993) ("Invidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant.") *Notari v. Denver Water Dep't*, 971 F2d 585, 588-589 (CA 10, 1992)(adopting background circumstances prong in gender discrimination case); *Boger, supra*, at 325 (adopting background circumstances prong in an equal protection violation case filed by white female).

The background circumstances formulation is consistent with Michigan precedent. As noted by then-Judge Young in *Harrison v. Olde Financial Group,* 225 Mich App 601; 572 NW2d 679 (1997), Michigan case law has varied the *McDonnell Douglas* elements of the *prima facie* case. *Id.* at 606-607, n. 6. "In one such Michigan formulation, to establish a *prima facie* case of intentional discrimination on the basis of circumstantial evidence, a plaintiff must show that she was a member of a protected class, that she was discharged, and that the person who discharged her was predisposed to discriminate against persons in plaintiff's protected class and

actually acted on that predisposition in discharging her." *Id.* at 607 n. 6 citing *Singal v. General Motors Corp.*, 179 Mich App 497, 503; 447 NW2d 152 (1989).

The so-called "predisposed" elements do not exist in every type of discrimination case under the ELCRA, nor do they appear in every factual circumstance. Instead, it is utilized in situations where the facts in dispute center around the decision-maker's predisposition, or lack thereof, to discriminate. *Id.* at 607 n. 6. Thus, to accept the argument that the "background circumstances" element is inconsistent with the ELCRA simply because it is tailored to fit the circumstances at hand would turn ELCRA case law on its head. Such a theory not only requires courts to reject the "background circumstances" test because it takes into account the history of the ELCRA, but also requires courts to reject *any* variation from the original burden-shifting test. Such a result would call into question previous decisions of this Court tailoring the *McDonnell Douglas* test.

C. In *Allen*, the Elements of a *Prima Facie* Case Under the *McDonnell Douglas* Shifting Burden Framework are Properly Tailored to Fit the Factual Situation Presented by a Claim of "Reverse" Discrimination.

The rationale for requiring, "background circumstances" in a "reverse discrimination"[6] case stems from an understanding of why a *prima facie* case under the shifting burden approach can be said to raise a rebuttable inference of discrimination, thus requiring the defendant to come forward with a legitimate nondiscriminatory reason for its conduct. That is, the shifting burden approach rests on the assumption that the *prima facie* case permits an inference of discrimination, that the employer's actions, unless otherwise explained, are more likely than not to be based on impermissible factors. See *Furnco, supra* 438 US 577. Requiring background

[6] Even the phrase "reverse discrimination" connotates a circumstance that is at odds with historical patterns of discrimination based on race and gender. See also *Black's Law Dictionary*, 1186 (5th Ed., 1979)

circumstances supporting the suspicion that the employer discriminates against the majority simply substitutes for the otherwise missing factor of a historical pattern of discrimination against that group in general. *Parker, supra.*

A finding that there is something wrong with the tailoring of the *McDonnell Douglas prima facie* case disregards the critical point that the inquiry is into whether the background circumstances "supports the suspicion" that the defendant might be an employer that discriminates against the majority, under circumstances where there is no direct evidence of discrimination. That is, the sole question is whether the *prima facie* case will raise a fair inference of discrimination. In reality, a *prima facie* case that "supports the suspicion" of discrimination is hardly an insurmountable hurdle. As explained in *Harding, supra*, background circumstances may be established in a number of ways.

It must also be kept in mind that the elements of a *McDonnell Douglas prima facie* case are not for the jury's consumption. Instead, they serve as a tool for judges to utilize in determining whether plaintiff has produced enough evidence to get to the jury:

> [T]he *McDonnell Douglas* approach merely provides a mechanism for assessing motions for summary disposition and directed verdict in cases involving circumstantial evidence of discrimination. It is useful only for purposes of assisting trial courts in determining whether there is a jury-submissible issue on the ultimate fact question of unlawful discrimination. The *McDonnell Douglas* model is *not* relevant to the jury's evaluation of evidence at trial. Accordingly, a jury should not be instructed on its application. [*Hazle, supra*, at 466-467, citing *Gehrig v. Case Corp.*, 43 F3d 340, 343 (CA 7, 1995).

Thus, the methods of proof are evaluated only by the judge. Further, the *Allen* test does not add or remove anything from the ELCRA. Instead, the test has to do with rules of evidence, burdens of production, and the court's inherent authority to control the admission of evidence so as to promote the interests of justice. See *People v. Wimberly,* 384 Mich. 62, 69; 179 NW2d 623 (1970).

ARGUMENT IV

THE "BACKGROUND CIRCUMSTANCES" PRONG IMPOSED BY *ALLEN* IS CONSISTENT WITH STATE AND FEDERAL EQUAL PROTECTION PRINCIPLES.

"The Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the law. US Const, Am XIV; Const 1963 Art 1, § 2.... Michigan's equal protection provision [is] coextensive with the Equal Protection Clause of the federal constitution." *Crego v. Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). It is well accepted that the Michigan Constitution offers no broader remedy than its federal counterpart when it comes to equal protection analysis. *Doe v. Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992). The constitutional guarantee of equal protection requires that the government treat similarly situated persons alike. *El Souri v. Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987), quoting *F.S. Royster Guano Co. v Virginia*, 253 US 412, 415; 40 S Ct 560; 64 L Ed 989 (1920). It does not require that differently situated persons be treated the same. Consequently, the guarantee of equal protection does not mean that a court must presume that discrimination against an historically favored class is just as common as discrimination against a historically disfavored class.

Members of historically disfavored groups establish an inference of discrimination by virtue of being in a historically disfavored group. Thus, requiring everyone else to demonstrate background circumstances to satisfy an inference of discrimination does not treat similarly situated people differently. See, generally, *Crego, supra*, at 258-259. All plaintiffs claiming discrimination in employment have the same burden, i.e., to prove that discriminatory animus motivated the employer. What it takes to raise a preliminary inference of that motive can vary

based on how the plaintiff is situated – just as with providing motive in any type of case. Thus, the "background circumstances" prong simply recognizes this country's historic past of societal and de jure discrimination against certain "socially disfavored" groups, and places a certain amount of evidentiary weight on that background, or lack thereof.

The argument that it would be "unconstitutional" to impose the "background circumstances" prong on members of historically favored groups because it "imposes upon them a higher burden of proof" lacks substance. First, such an argument misconstrues the shifting burden analysis altogether. In *Hazle*, the Court stated that it is improper to describe the requirement to establish a *prima facie* case as a "burden of proof" or "burden of production." *Hazle, supra* at 464. Instead, it "merely establishes a rebuttable presumption." *Id.* Because there is no 'burden of proof" at the initial state of a *McDonnell Douglas*, it cannot be said that there is a *higher* burden of proof on members of traditionally favored classes.

Second, the modified *prima facie* test in reverse discrimination cases is not "heightened," rather, it is equivalent to a traditional discrimination case, but modified to fit the factual scenario. All plaintiffs show that: (1) they were qualified; (2) they suffered an adverse employment action; and (3) the position was given to another person. *Hazle, supra* at 463. The only difference in the tests is that a plaintiff who is a member of a class that has not been an object of a history of discrimination must show that the position was given to another under circumstances that give rise to an inference of unlawful discrimination, by putting forth evidence of background circumstances that give rise to that inference. In other words, a reverse discrimination plaintiff must show that even without the historical pattern of discrimination against his class, the facts are still sufficient to support an inference of discrimination. The difference in this one element

merely adjusts the *McDonnell Douglas prima facie* case to fit the circumstances so that meeting the requirements can fairly be said to give rise to that inference.

Thus, the only difference is in how dissimilar plaintiffs establish the fourth prong. It is undisputed that the remainder of the shifting burden analysis is identical for both traditional and reverse discrimination cases. It is also undisputed that regardless of the type of discrimination alleged, the shifting burden analysis is inapplicable to any plaintiff with "direct evidence" that an employment decision was the result of unlawful discrimination. *DeBrow*, *supra,* at 539. Consequently, no disparity can be found in the above tests, let alone a "heightened burden of proof" or any equal protection violation.

Plaintiff-Appellant has cited *McDonald v Santa Fe Trail*, 427 US 273; 96 S Ct 2574; 49 L Ed 2d 493 (1976), to argue that the same proof standards apply to both black and white employees. However, the *Santa Fe Trail* case simply provides the terms of Title VII are not limited to discrimination against members of any particular race, therefore, white people are protected under the act *Id.* 427 US at 278-280. This is a point that Defendant-Appellee does not dispute.

The argument that the *Santa Fe* case rejected any modification to the *McDonnell Douglas* shifting burden approach is incorrect. Instead, the Court reiterated that the means by which a Title VII plaintiff "might" make out a *prima facie* case is not necessarily applicable in every respect to differing factual situations. *Id.* at 278-780. n 6. Thus the Court inferred that the test would necessarily be modified for white plaintiffs, i.e., so that a white plaintiff would not be required to establish that he belongs to a racial minority. Accordingly, the "background circumstances" element is entirely consistent with the principles espoused in *Santa Fe.*

The background circumstance test does not violate the equal protection guarantees of federal or Michigan constitutions by imposing a greater burden of proof on one class of persons due to their race. The test does require all plaintiffs claiming unlawful racial discrimination, in the absence of direct evidence of discrimination, to establish an inference of discrimination. Consistent with the legislative history and intent of the ELCRA, minority plaintiffs establish the inference by being members or by being perceived as members of a historically disfavored group. Majority plaintiffs establish the same inference by demonstrating background circumstances.

ARGUMENT V

SHOULD THE "BACKGROUND CIRCUMSTANCES" STANDARD CONTINUE TO BE USED WHEN EVALUATING A MOTION FOR SUMMARY DISPOSITION ON REVERSE DISCRIMINATION CASES?

A. "Background Circumstances" Test in Other Courts

It is clear that the ELCRA (and Title VII) protect both minority and non-minority plaintiffs. It is also clear that the Supreme Court in *McDonnell Douglas*, implied that the elements of the *prima facie* case would not be the same in all situations. It bears repeating that the *McDonnell Douglas* framework only applies when a plaintiff attempts to prove intentional discrimination through circumstantial evidence.

Lower courts have modified the *prima facie* test in cases involving various employment actions including promotion. However, the controversy surrounding modifications to the *prima facie* case for reverse discrimination, which in most federal circuits takes the form of a "background circumstances" standard, has called into question the legitimacy of imposing a different type of burden upon a non-minority plaintiff. This has led some federal circuits to reject the "background circumstances" standard altogether.

The Seventh Circuit in *Mills v Health Care Service Co.*, 171 F 3d 450 (CA 7, 1999), used the background circumstances test to require plaintiff in a reverse discrimination case to put forth evidence at the *prima facie* level to prove the ultimate question of discrimination. Id. at 457.

The Tenth Circuit's case of *Notari v Denver*, 971 F 2d 585, (CA 10, 1992), offered two avenues for a plaintiff in a reverse discrimination case to state a *prima facie* case. A plaintiff could either use the background circumstances test or indirect evidence to support reasonable probability that but for his status, the employment action would have favored him. Id at 589-590.

The Eleventh Circuit rejected the background circumstances test, because "all persons are protected by Title VII," therefore, a plaintiff could satisfy the first prong of the *McDonnell* Douglas test by pleading membership in a "protected class." *Wilson v Bailey,* 934 F 2d 301 (CA 11, 1991).

The Third Circuit found in *Iadimarco v Runyon*, 190 F 3d 151 (CA 3, Cir 1999) that the background circumstances test was "irremediably vague and ill defined" along with being "difficult, if not impossible to define." The Court felt that too much discretion is given to the trial judge under such a test. Id. at 158-160. In *Iadimarco*, the court concluded that for a reverse discrimination plaintiff to establish a prima facie case with indirect evidence, he must present sufficient evidence to allow a reasonable fact finder, given the totality of circumstances to conclude that the defendant treated the plaintiff less favorably than others because of race, color, religion, sex, or national origin. Id. at 163.

The Sixth Circuit has also stated some concerns over the "background circumstances" test. The separate panels of the Sixth Circuit expressed "misgivings" about the test, indicating that it required "heightened pleading" from majority victims. *Pierce v Commonwealth Life Ins.*

Co., 40 F3d 796 (CA 6, 1994); *Zambetti v Cuyahoga Community College*, 314 F 3d 249, 257 (CA 6, 2002). More recently, a panel of the Michigan Court of Appeals expressed reservations about the background circumstances test in *Venable v General Motors Corp* (On Remand) 253 Mich App 473; 656 NW 2d 188 (2003).

The *Notari* and *Iadimarco* courts attempted to articulate what evidence would be sufficient to establish background circumstances, however, those attempts fell short for several reasons. First is that fact that background circumstances relate to past discrimination against a group, rather than the specific instance of racial or gender discrimination against the plaintiff. Second is that fact that the burden of demonstrating discrimination is placed on the plaintiff in the prima facie stage. Finally, without clear guidelines, plaintiffs and employers both suffer from the confusion about the *prima facie* showing and the proper employment actions to take.

B. "Background Circumstances" Problems for Defendant-Employers

It is this last problem that has been difficult for Defendant-Appellee in the instant case. Given the amorphous nature of "background circumstances" the Plaintiff-Appellant has sought to question every action Defendant-Appellee has taken involving a female or minority that he didn't feel was justified. The incidents and situations that Plaintiff-Appellant attempts to use to demonstrate "background circumstances" are nothing more than speculation about Defendant-Appellant's actions. Even with regard to past promotional practices, an area about which Lind should have adequate knowledge, he completely errs on the facts. The fact is that Chief Pope did not adopt a practice to promote in rank order. Plaintiff-Appellant ignores the past employment actions involving the promotion of white males and focuses solely on employment decisions involving minorities and females.

Having an undefined "background circumstances" standard allows plaintiffs to complain about unrelated versions of past employer actions, often including those which are not even the same type of employment action as affected them. An example of the inherent difficulty with "background circumstances" is that it tends to degrade from a workable standard where the evidence indicates that the decision-maker "has some reason or inclination to discriminate invidiously against whites," to a standard where "there is something 'fishy' about the facts of the case." *Harding v Gray*, 9 3d 150, 153 (1993). Having such a vague standard encourages the type of fishing expedition for background circumstances evident in the present case. This is overly burdensome to employers defending such claims.

C. The Proposed "Neutral Factor" Test

In much the same way that this Court clarified the *prima facie* case in age discrimination in workforce reductions in *Matras, supra.* The instant case provides the opportunity for clarification of the *McDonnell Douglas* test as it applies to another type of employment decision: promotions. This Court could remove the troublesome first prong of the *McDonnell Douglas* test cases involving promotions and eliminate the need for a showing of background circumstances.

Where there is a promotional process in place, the approach the Court should take in both traditional and reverse discrimination cases is to entirely delete the first prong of the *McDonnell-Douglas* standard (plaintiff belongs to a racial minority), and add an additional requirement for the decision-maker in response to the *prima facie* test. Under the proposed "neutral factor" test, in order to establish a *prima facie* case in the promotion context under the first part of the *McDonnell Douglas* framework, any plaintiff would simply have to demonstrate

he or she: (1) applied for and was qualified for promotion; (2) despite qualification, was not chosen; and (3) the person chosen was of a different race or gender.

After meeting the requirements of the above standard, the burden shifts to the employer, who must (1) show that a non-discriminatory promotional procedure was followed; and (2) articulate a legitimate, non-discriminatory reason for the promotional decision.

Then the burden shifts back to plaintiff to demonstrate that the articulated reason(s) are: (1) false, and (2) pretextual for discriminatory intent based upon race or gender.

This approach is for all intents and purposes, neutral. Race or gender enters the picture only when the plaintiff is attempting to demonstrate pretext. Thus, no greater burden (perceived or real) is placed upon the non-minority male plaintiff.

Under such an approach the instant case is analyzed as follows:

The Plaintiff-Appellant would have to show:

(1) a) He applied for and took the promotional test (Appellant's Appendix, 99a.);

b) He had three years seniority with the employer (Appellant's Appendix, 99a.);

c) He achieved a 70% or greater on the written exam (Appellant's Appendix, 99a.);

d) He was in the pool of five when the promotion decision was made. (Appellant's Appendix, 100a).

(2) Although he was qualified under (1) above, he was not chosen.

(3) The person chosen was of a different race and/or gender.

This test means that the Plaintiff-Appellant had a prima facie case the moment that a minority or female in the top five with him was promoted.

The burden then shifted to the Defendant-Appellee to:

(1) show that the person promoted had three years seniority, took the test, achieved at least 70% on the written exam and was in the pool of five persons eligible for promotion, (Appellant's Appendix, 99a-100a); and

(2) articulate a legitimate, non-discriminatory reason for the choice. (Appellee's Appendix, 5b, Pope Dep. p. 35.)

Arthur McClenney had three years of seniority, achieved at least 70% on the written exam and was in the pool of five when he was promoted. He was promoted after he and the other four eligible members of the pool of eligible interviewed with Chief Pope. Pope promoted Arthur McClenney because of his maturity and sense of service. The burden then shifted to the Plaintiff-Appellant to demonstrate that the articulated reason was both false and a pretext for a discriminatory intent based upon race.

This is where the Plaintiff-Appellant fails in this case, because he expended no effort to demonstrate that Pope was being untruthful or that Arthur McClenney is immature or has little sense of service. Instead, Plaintiff-Appellant has exhibited the same sense of entitlement based on his prior limited supervisory experience at a small township police department, and college education to the courts as he did with Chief Pope.

It goes without saying that a candidate can "look" good on paper and not interview well. The Plaintiff-Appellant has simply failed to demonstrate that the decision-maker's reasons were false and served as pretext for racial discrimination.

This modified approach to discrimination cases involving promotions negates claimed of violations of equal protection and offers guidance for employers. Defendant-Appellees acknowledge that the proposed "neutral factor" *prima facie* elements do not raise the presumption of discrimination for individual members of historically disfavored groups. Rather it imposes the same requirements on all plaintiffs.

ARGUMENT VI

ASSUMING THE DEMONSTRATION OF A PRIMA FACIE CASE, PLAINTIFF-APPELLANT DID NOT PRODUCE EVIDENCE TO REFUTE DEFENDANT-APPELLEE'S LEGITIMATE NON-DISCRIMINATORY REASON FOR MAKING THE PROMOTION.

Assuming the Plaintiff-Appellant demonstrated a *prima facie* case using the *McDonnell Douglas* test, modified by the background circumstances component or the "neutral factor" test, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a "legitimate, non-discriminatory reason" for the plaintiff's failure to be promoted so as to overcome and dispose of the presumption, *Burdine, supra.*

As Chief Pope testified, Arthur McClenney's demonstration of maturity and sense of service during the interview was determinative (Appellee's Appendix, 5b, Pope Dep., p. 35). This stood in contrast to the impression Plaintiff-Appellant made upon Pope that the position was "owed to him" (Appellee's Appendix, 6b, Pope Dep., p. 37).

Once the City produced evidence of a non-discriminatory reason for the decision, the inference of discrimination dropped away and the burden of proof shifted back to the Plaintiff-Appellant. It was then incumbent upon the Plaintiff-Appellant to show by a preponderance of admissible, direct or circumstantial evidence that there was a triable issue that the employer's proffered reasons were not true reasons, but were mere pretext for discrimination, *Lytle* v *Malady,* 458 Mich 153, 174, 579 NW2d 906 (1998). The Plaintiff-Appellant was required to show that not only was the reason false, but also that discrimination was the real reason for the employment decision. *Town, supra,* at p. 705.

The Michigan Supreme Court has adopted what is known as the "intermediate" position for determining the proper summary disposition standard for employment discrimination, *Town, supra.* So as to survive summary disposition, a plaintiff must not merely raise a triable issue that

the employer's proffered reasons were pretextual, but that it was a pretext for racial discrimination. As mentioned above, Plaintiff-Appellant failed to make any demonstration to show that the non-discriminatory reason for the promotion of Arthur McClenney over the Plaintiff-Appellant was pretextual so as to disguise discriminatory intent. Plaintiff-Appellant's failure to proffer any evidence to cast doubt on the maturity and sense of service of Arthur McClenney is fatal to his case.

It is at this point that the disputed issue of the Plaintiff-Appellant's 1990 suspension comes into play. Defendant-Appellee does not assert that the suspension played a role in the decision not to promote Lind in 1996. Rather, it was argued at the hearing on Defendant-Appellee's Motion for Summary Disposition, that the circumstances surrounding the suspension demonstrated a lack of maturity and a lack of judgment on the part of Lind, which contrasted with the qualities that Pope found determinative when he promoted McClenney. As Plaintiff-Appellant failed to present sufficient evidence to create an issue of material fact that the proffered reason was a pretext hiding a discriminatory animus, Defendant-Appellant was entitled to summary disposition, even assuming a *prima facie* case had been established.

Regarding the demonstration of pretext, guidance is provided by the decision in *Manzer* v *Diamond Shamrock Chemicals Company*, 29 F3d 1078 (CA 6, 1994). Although not binding, federal cases interpreting Title VII, which is analogous to Michigan Civil Rights Act, is considered persuasive by this Court. *Rasheed v. Chrysler Corp.*, 445 Mich 109, 123; 517 NW2d 19 (1994). The *Manzer* decision distinguishes between three types of pretext showings and develops different evidentiary bases for each showing. To show pretext, a plaintiff must show either: (1) defendant's reasons had no basis in fact; (2) the reasons did not actually motivate the decision; or (3) the reasons were insufficient to warrant the decision. (Emphasis in original.)

Plaintiff-Appellant in this case made no showing that the Defendant-Appellee's reasons for promoting McClenney over Lind either had no basis in fact or were insufficient to warrant the decision. In order to satisfy either the first or third type of pretext, Plaintiff-Appellant was required to produce additional evidence of discrimination to show that the reasons offered by the Defendant-Appellee are factually false and provide a basis of a "suspicion of mendacity." *Manzer, supra,* at 1084.

Once an employer produces a non-discriminatory reason for its decision, even if incredible, the presumption of discrimination drops away or evaporates. *Town, supra,* p. 695. While the employee can rely on the initial evidence used to demonstrate a *prima facie* case, the employee does not without the benefit of earlier presumptions. *Town, Id.* While the plaintiff may rely solely upon the previously produced evidence to refute the employer's reasons for the decision, to do so comes at risk. At a minimum, such evidence would be coupled with an "effective cross-examination of the defendant." *Town, supra,* p. 696. Further, the evidence must not only demonstrate a lack of credibility on the part of the employer, but also permit a finding of discrimination. As noted by this Court, "That there may be a triable question of falsity does not necessarily mean that there is a triable question of discrimination." *Town, Id.* citing *Lindeman and Grossman, Employment Discrimination Law (3rd Ed).* In this case, Plaintiff-Appellant made no such demonstration and, in fact, he admits that McClenney is probably a good sergeant. (Appellee's Appendix, 23b, Lind Dep. p. 39.)

This leads to consideration of the second type of pretext. However, Plaintiff-Appellant also made no demonstration that the reasons proffered did not actually motivate the decision in this case. In the second type of pretext situation, a plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate the

decision. However, the Plaintiff-Appellant was required to introduce additional evidence of discrimination because the reasons offered by the Defendant-Appellee were not being directly challenged and therefore did not bring about an inference of discrimination. In this situation, a plaintiff asserts that the sheer weight of circumstantial evidence makes it more likely than not that the explanation for the decision is a pretext. However, a plaintiff's bare bones *prima facie* case is not sufficient to defeat a motion for summary disposition. To permit otherwise would mean every such case must go to trial. Instead, a plaintiff must introduce additional evidence of discrimination. A plaintiff must attack the credibility of the explanation by showing it is more likely that an unlawful motivation is the reason for the employment decision. In this case, Plaintiff-Appellant did not offer additional evidence to refute the non-discriminatory reason of the City as a pretext. Instead, Plaintiff-Appellant focuses on his alleged superior qualifications and that the City improperly relied upon a 1990 two-day suspension to not promote him. It cannot be said that the circumstantial evidence of his superior credentials and two-day suspension makes it more likely than not that the Plaintiff-Appellant was passed over because he is white.

The Defendant-Appellee will not rehash its arguments concerning Plaintiff-Appellant's superior qualifications. In should be sufficient that Pope found McClenney to be the more attractive candidate based on his maturity and sense of service. It should go without saying that having superior credentials on paper does not mean that a candidate will be a good supervisor of subordinates. This proposition is not without historical basis.

At the outbreak of the Civil War, a West Point graduate from Galena, Illinois, who had not distinguished himself either while at the Academy, in service during the Mexican War, or in private life, offered his services to Major General George McClellan, who at the time was

responsible for all Ohio volunteers. McClellan refused the offer and the captain from Galena was appointed as a colonel to head a group of Illinois volunteers in the western theater of the war. President Lincoln shortly named McClellan commander of the Army of the Potomac, responsible for operations in Virginia and the defense of Washington D.C. Although he graduated second in his class, McClellan proved to be a disappointment, being repeatedly out-maneuvered by his opponents in the eastern theater, Joseph E. Johnston and Robert E. Lee. McClellan was ultimately dismissed by Lincoln and after a succession of other disappointing commanders, President Lincoln appointed the Galena colonel, who now was a major general in the Regular Army, to oversee the prosecution of the war. The new general was still little regarded in the east, but he had impressed Lincoln because, "He fights," and his coordinated plan resulted in the fall of the Confederacy. Thus Ulysses S. Grant, of whom it had been said that he was successful at being mediocre, came to bring the Civil War to a close and who most students of military history consider to be one of the best generals produced by the United States.

While the City does not presume to compare Arthur McClenney to Ulysses S. Grant, this example demonstrates that merely because one has an inflated idea of their own credentials, does not mean that it is a view shared by others, or that paper credentials translate into success. Rather, it is often times the person that has to work harder to prove themselves and whose philosophy is more clearly in line with their superior who is the better person for the position.

In this case, Plaintiff-Appellant made no showing satisfying the *Manzer* tests for pretext. When the plaintiff fails to make a demonstration of pretext, judgment for the defendant is warranted because the plaintiff has failed to fulfill the allocation of burdens outlined in *McDonnell Douglas* and *Burdine*.

CONCLUSION AND PRAYER OF RELIEF

Under either the "background circumstances" test or the proposed "neutral factor" test, the Plaintiff-Appellant could not withstand summary disposition, due to his failure to demonstrate that the articulated reasons for the promotion decision were a false, pretextual reason for racial discrimination. Defendant-Appellee requests this Court affirm the summary disposition of Plaintiff-Appellant's cause of action.

Dated:

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